No. 49410-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE ESTATE OF DARLENE SNIDER

KENNETH CROGG and DENNIS CROGG

Appellants

V.

LAWRENCE BRADLEY "BRAD" MILLIGAN

Respondent.

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
(Hon. Suzan L. Clark)

RESPONDENT'S BRIEF

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Table of Contents

Table of Authorities

I. INTRODUCTION

As a preliminary matter, there is some confusion on this appeal because the appellants are unclear as to which decision of the trial court they are appealing. In their Notice of Appeal, the appellants purport to be appealing from "[t]hat Order Confirming Prior Order entered with the court ***August 5, 2016***,"[1] and they attach a copy of the trial court's order of that date.[2] That order denied the appellants motion, under CR 60(b)(11), to vacate a prior order.

In their opening brief, however, the appellants assign error to the trial court's order—entered on ***April 22, 2016***—granting the respondent's motion to enforce a settlement agreement, pursuant to the Trusts and Estates Dispute Resolution Act ("TEDRA").

The issues raised on the appeal differ, depending on whether the appeal is from the April 22nd order or from the August 5th order. Because it is impossible to tell from the

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[1] CP 102
[2] CP 104—105

appellants' papers exactly which order they are appealing, the respondents will deal with both possibilities in this brief.

If the appeal is from the April 22nd order, enforcing the settlement agreement, the appeal raises the following issue.

Authority to Enforce Settlement? When the legislature enacted TEDRA, it stated its intent "that the courts shall have full and ample power and authority …to administer and settle…[a]ll matters concerning the estates…of deceased persons."[3] Thus, if the parties execute a written settlement agreement, that agreement may be filed with the court, at which point it "will be deemed approved by the court and is equivalent to a final court order binding on all persons interested in the estate or trust."[4] In this action, the parties executed a written settlement agreement and agreed that it should be filed with the court. Thereafter, the parties reached an impasse over the meaning of one provision in the agreement. The respondent brought a motion to enforce the settlement agreement in

[3] RCW 11.96A.020(1)(a)
[4] RCW 11.96A.230(2)

accordance with his interpretation. Did the trial court have the authority to consider and grant the motion to enforce the settlement agreement?

If this appeal is from the August 5th order, in which the trial court refused to vacate its prior order, then the appeal raises the following issue.

Denial of CR 60(b) Motion? Under CR 60, a trial court may vacate an order, but only "for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings." Thus, "an error of law may not be corrected by a motion pursuant to CR 60(b)."[5] Because it was too late to file a motion for reconsideration, the appellants filed a motion under CR 60(b)(11) and argued that the court's prior order was "contrary to the agreement…and contrary to the law."[6] Did the trial err in denying the appellants CR 60(b) motion?

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[5] *Pamelin Industries, Inc. v. Sheen-U. S. A., Inc.*, 95 Wn.2d 398, 403, 622 P.2d 1270 (1981)
[6] CP 32: 12-13

II. STATEMENT OF THE CASE

This case arises out of the estate left behind by the deceased, Darlene B. Snider. Ms. Snider was survived by her husband, Brad, and by three children from a prior marriage, Laura Schumacher, Kenneth Crogg, and Dennis Crogg.[7] A dispute arose between Brad and his wife's two sons, Ken and Dennis, regarding the ownership of the marital home.[8] Brad filed a TEDRA petition, and the "parties thereafter agreed to mediation to resolve their disputes regarding the fair and equitable distribution of the Decedent's estate."[9] They reached an agreement, and reduced it to a written "Nonjudicial Binding Settlement Agreement."

The marital home involved two parcels of property, one on which the home was located, and a vacant lot adjacent to it. The settlement agreement provided that Brad would receive the house and the lot upon which it sat. Moreover, the parties

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[7] CP 2: 4-6
[8] Meaning no disrespect, this brief shall sometimes refer to the parties by their first names, as in the trial court.
[9] CP 2: 11-15

agreed that "Brad shall have the first option to purchase" the vacant lot "based on a current appraised value to be obtained by Ken & Dennis within 60 days of this agreement," and they agreed that Brad would have "30 days from the date of delivery of the appraisal" to purchase the property.[10] And germane to this appeal, the parties agreed that their written settlement agreement would be filed with the court and that "the matters address in this Agreement are appropriate for resolution under the procedures authorized by RCW 11.96A.220."[11]

At the time of the agreement, the vacant lot had been most recently appraised—one year earlier—at a value of $150,000.[12] Several months after the agreement was executed, Ken and Dennis submitted an appraisal that valued the vacant lot at $460,000—more than three times the value set forth in the appraisal conducted just one year before.[13]

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[10] CP 2: 17-19 and CP 3: 7-11
[11] CP 4: 9-11
[12] CP 61
[13] CP 79

As a result of the vast discrepancy between the two appraisals, the parties reached an impasse. Ken and Dennis insisted that if Brad wanted to exercise his option to purchase the vacant lot he would need to pay $460,000 to do so. Brad insisted that the appraisal had not been obtained in good faith, that he should not be required to pay $460,000 for the vacant lot, and that a third appraisal was needed. Unable to resolve their differences, Brad brought a motion to the court for guidance.

In his motion, Brad argued that, by submitting the second appraisal and demanding $460,000, Ken and Dennis had breached their duty of good faith and fair dealing under the settlement agreement. "Because the second appraisal was obtained by the beneficiaries with a direct financial interest and is three times that of the first appraisal obtained just one year prior, it appears that this appraisal was not obtained or submitted in good faith."[14] Brad also argued that an implied

[14] CP 50: 6-8

term of the agreement was that the appraisal obtained by Ken and Dennis had to be reasonable. Accordingly, Brad asked that the "Court select a third appraiser not known to any party to assess this lot and provide a value to the Court to be used to complete the terms of the Settlement Agreement."[15]

Ken and Dennis did not file any opposition to Brad's motion. The record on appeal does not indicate whether Ken and Dennis appeared at the hearing. Because they have not made the Reporter's Transcript part of the record, we do not know what—if anything—Ken and Dennis may have argued to the trial court. For all we know, Ken and Dennis may have stipulated to Brad's request for the court to appoint a third appraiser.

In any event, we do know that the court entered an order at the conclusion of that hearing, on April 22, 2016. The April 22nd order granted Brad's motion, ordered that the "Personal Representative shall arrange for a third appraisal of the lot," and

[15] CP 50: 11-14

ordered that Brad would "have 30 days from the date of receiving the appraisal to purchase the property."

More than ten days went by, and neither Ken nor Dennis moved the court to reconsider its order. Two months later, on June 21, 2016, Ken and Dennis filed a motion "pursuant to CR 60(b) and 60(c)," asking that the court vacate its April 22nd order.[16] In their Memorandum, however, Ken and Dennis Crogg limited their arguments to CR 60(b)(11); they did not explain how CR 60(c) applied, nor is it apparent how it could have applied to their motion.[17]

In their CR 60(b) motion, the Croggs argued to the trial court—just as they argue to this court—that the trial court did not have the authority to ***change*** the terms of the settlement agreement. To advance their cause, Ken and Dennis set up a "straw-man" argument. They argued that, in order for the court to change the agreement, Brad needed to show that it was "a product of fraud or that the attorney overreached his

[16] CP 60
[17] CP 30-37

authority."[18] And because Brad had not made this showing, they argued, the trial court lacked the authority to enter its April 22nd order.

Brad opposed the Croggs' CR 60(b) motion, noting it was nothing more than "a motion seeking to re-litigate this matter three months after it has already been decided."[19] As Brad further explained, when he brought his prior motion, he was not seeking to set aside or modify the settlement agreement—he was seeking to ***enforce*** it under a reasonable interpretation of its terms. Brad also cited the trial court to the many provisions of TEDRA that provided "broad authority for the court to uphold the Order entered in this matter."[20]

The court heard the Croggs' CR 60(b) motion on July 28, 2016. On August 5, 2016, the court issued its order denying the

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[18] CP 33: 11-15
[19] CP 97: 1-2
[20] CP 98: 23—99: 15

Croggs' CR 60 motion and declining to vacate its earlier order.[21]

On September 2, 2016, the Croggs filed their Notice of Appeal, indicating they were appealing from "[t]hat Order Confirming Prior Order entered with the court August 5, 2016,"[22] and attaching a copy of the court's August 5th order.[23] The Croggs did not mention the April 22nd order, nor did they attach it to their Notice of Appeal. Yet, in their Amended Brief of Appellants, the Croggs assign error only to the trial court's entry of the April 22nd order.

III. ARGUMENT

A. Standards of Review

In their brief, the appellants mention a *de novo* standard of review and an abuse of discretion standard of review, but they do not specify which standard applies to their appeal. As

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[21] CP 42—43
[22] CP 102: 33-35
[23] CP 104—105

shown herein, however, if the appeal is taken from the trial court's April 22nd order, this court should apply an abuse of discretion standard of review. Similarly, if the appeal is taken from the trial court's August 5th order, the standard of review is also for an abuse of discretion.

With regard to the April 22nd order, the court entered this order under its broad authority, granted by TEDRA, to enforce a settlement agreement that had been filed with the court. There is no published opinion stating the proper standard for reviewing precisely this type of decision by the trial court. There is, however, a case stating the proper standard in the analogous situation, wherein the trial court exercised a similar power under TEDRA. In *In re Estate of Fitzgerald*, the trial court denied a "continuance to conduct discovery in a TEDRA proceeding."[24] On appeal, the court noted that "TEDRA gives the trial court 'full and ample power and authority' to administer and settle all estate and trust matters 'all to the end

[24] 172 Wn. App. 437, 448, 294 P.3d 720 (2012)

that the matters be expeditiously administered and settled by the court.'[25] Thus, the court concluded: "Given this broad grant of power to trial courts by the legislature, we must accord significant deference to a trial court's decision to deny a continuance to conduct discovery in a TEDRA proceeding."[26]

The same reasoning applies with equal force to any review of the April 22nd order below. That order was also entered under the broad authority conferred by TEDRA. Because that authority is so broad, this court should give the trial court wide latitude in exercising that authority. Thus, respondent submits the April 22nd order should only be reversed if it constitutes an abuse of the trial court's discretion.

On the other hand, if this appeal is taken from the August 5th order—denying the appellants' CR 60(b) motion—the analysis is much simpler. According to the Supreme Court, "A trial court's denial of a motion to vacate under CR 60(b) will

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[25] *Ibid.* (citations omitted)
[26] *Ibid.*

not be overturned on appeal unless the court manifestly abused its discretion."[27]

Thus, regardless of which order the Croggs are appealing, the trial court should only be reversed if it manifestly abused its discretion.

B. The Appellants Have Failed to Provide This Court with an Adequate Record to Review the April 22nd Order

As a preliminary matter, this court should decide whether it has enough information to review the April 22nd order. As noted in the Statement of the Case above, the Croggs did not file any written opposition to Brad's motion to enforce the settlement agreement. Moreover, under RAP 9.2(b), the party seeking review "should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review." Yet, the Croggs have

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[27] *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000) (citing *In re of Guardianship of Adamec*, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983))

decided not to provide this court with the transcript of the April 22nd hearing. As a result, the court has zero information regarding the argument, if any raised by the Croggs in opposition to Brad's motion. Nevertheless, they ask the court to decide that the trial court abused its discretion.

As the Supreme Court has held, where the record on review is insufficient, an appellate court cannot properly determine whether a trial court's exercise of discretion was manifestly unreasonable or based on untenable grounds.[28] Moreover, an appeal may be dismissed under RAP 9.10 if the appellants do not make a good faith effort to provide a sufficient record on appeal.[29] Thus, to the extent this appeal is taken from the trial court's April 22nd order, the appeal may be dismissed for the appellants' failure to provide an adequate record.

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[28] *State v. Wade*, 138 Wn.2d 460, 465-66, 979 P.2d 850 (1999)
[29] *Ibid.*

C. The April 22nd Order was not a Manifest Abuse of the Trial Court's Discretion

When it comes to TEDRA actions, the legislature has conferred upon the trial courts the broadest possible authority to resolve disputes involving trusts or estates. As the legislature states at the beginning of the statute:

> RCW 11.96A.020
>
> General power of courts—Intent—***Plenary power*** of the court.
>
> (1) It is the intent of the legislature that the courts shall have ***full and ample power and authority*** under this title to administer and settle:
>
> (a) ***All matters concerning the estates*** and assets of incapacitated, missing, and deceased persons…. (Emphasis added)

And if this statement left any doubt as to the breadth of the trial court's powers, the legislature instructed that any such doubts should be resolved in favor of finding such authority.

> If this title should in any case or under any circumstance be inapplicable, insufficient, ***or doubtful*** with reference to the administration and settlement of the matters listed in subsection (1) of this section, ***the court nevertheless has full power***

> ***and authority to proceed*** with such administration and settlement ***in any manner and way*** that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.[30]

Moreover, the legislature granted the trial courts the authority in TEDRA actions to "order and cause to be issued ***all such writs and any other orders as are proper or necessary***; and ***do all other things proper or incident*** to the exercise of jurisdiction under this section."[31]

Running the risk of overkill, the respondent also notes TEDRA's provision that:

> The court may make, issue, and cause to be filed or served, ***any and all manner and kinds of orders***, judgments, citations, notices, summons, and other writs and processes that might be considered ***proper or necessary*** in the exercise of the jurisdiction or powers given or intended to be given by this title.[32]

The legislature extended the courts' extremely broad powers with particular force to the matter of settlement

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[30] RCW 11.96A.020(2) (emphasis added)
[31] RCW 11.96A.040(3) (emphasis added)
[32] RCW 11.96A.060 (emphasis added)

agreements. Thus, "[i]f all parties agree to a resolution of any such matter, then the agreement shall be evidenced by a written agreement" which "shall be binding and conclusive on all persons interested in the estate or trust."[33] And if that agreement is filed with the court, it becomes tantamount to a court order. "On filing the agreement or memorandum, the agreement will be deemed approved by the court and ***is equivalent to a final court order*** binding on all persons interested in the estate or trust."[34]

Under this last provision, it is evident that a motion to enforce a settlement agreement is no different from a motion to enforce a court order. In other words, if the parties cannot agree on compliance with the terms of a settlement agreement filed under TEDRA, then the court is the final arbiter of that dispute. The Croggs argue that the trial court lacked the authority to issue its April 22nd order, but that argument ignores the analysis required by the patently clear language used by the

[33] RCW 11.96A.220
[34] RCW 11.96A.230(2)

legislature in enacting TEDRA. Even the legislative history of TEDRA makes clear that "[t]he act reaffirms that the courts have ***full power*** to administer and settle ***all matters*** concerning trusts and estates."[35]

In sum, the parties entered into a written settlement agreement that complied with the provisions of TEDRA. They agreed to file it with the trial court, and they further agreed "the matters address in this Agreement are appropriate for resolution under the procedures authorized by RCW 11.96A.220." In other words, the parties agreed to allow the court to be the final arbiter of all disputes concerning that agreement. Now that the Croggs are unhappy with the court's decision, they have attacked the very authority they conferred on the court in the agreement. Moreover, under TEDRA, the trial court had as much authority to resolve disputes regarding the settlement agreement as the court would have regarding its own orders.

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[35] Final Bill Report, S.B. 5196, Laws of 1999, ch. 42, at 1 (emphasis added)

Thus, the court did not abuse its discretion by entering its April 22nd order.

D. The August 5th Order was not a Manifest Abuse of the Trial Court's Discretion

Because the time had long passed for the Croggs to file a motion for reconsideration of the April 22nd order, the Croggs took a different tack. After waiting two months, they brought a CR 60 motion, asking the trial court to vacate its prior order. While their motion mentioned both CR 60(b) and CR 60(c), the Croggs' papers only advanced CR 60(b)(11) as the basis of their request. As shown immediately below, however, the Croggs' request did not fit within the extremely rare situations in which a court should vacate its order under this provision.

It has been said that relief pursuant to CR 60(b)(11) "should be confined to situations involving ***extraordinary***

circumstances not covered by any other section of the rule."[36] Similarly, the Supreme Court has noted that CR 60(b) does not authorize vacation of judgments except for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings.[37] Thus, merely claiming an error of law is not sufficient to ask a court to vacate an order. As the Supreme Court has said: "We are mindful of the rule that an ***error of law may not be corrected by a motion pursuant to CR 60(b)***, but must be brought up on appeal."[38]

As the Supreme Court noted in *State v. Keller*:

> Appellant's arguments are directed chiefly to errors of law which are thought to have been committed in entering the original judgment now sought to be vacated. We have too often held that such a proceeding as this [CR 60(b)] cannot be used as a means for the court to review and revise its own final judgment.[39]

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[36] *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982) (citing *State v. Scott*, 20 Wn. App. 382, 580 P.2d 1099 (1978), *aff'd* 92 Wn.2d 209, 595 P.2d 549 (1979)) (emphasis added)

[37] *Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756, 415 P.2d 501 (1966)

[38] *Pamelin Industries, Inc. v. Sheen-U. S. A., Inc.*, 95 Wn.2d 398, 403, 622 P.2d 1270 (1981) (citations omitted) (emphasis added)

[39] *State v. Keller*, *supra*, 32 Wn. App. at 140

In light of these authorities, it is evident that the trial court did not manifestly abuse its discretion by denying the Croggs' request to vacate its April 22nd order. In making their motion, the Croggs argued that the trial court had failed to apply the proper law when it granted the April 22nd order. The total sum of their argument was that the trial court had applied the wrong legal standard to Brad's motion to enforce the settlement agreement. According to their CR 60(b) motion, the trial court should have required Brad to show that the settlement agreement "was a product of fraud or that the attorney overreached his authority."[40] But even if the trial court had made an error of law—which it did not—this still would not be a proper basis for a CR 60(b) motion. Otherwise, there would be no limit on motions for reconsideration, and there would be no finality to decisions by the court.

[40] CP 33: 13-15

E. The Croggs' Interpretation of the Settlement Agreement is Not Reasonable

On a final note, even if the court were to apply a de novo review to both of the trial court's decisions, it should still uphold those decisions. The Croggs' essential argument was that Brad's only option was to purchase the vacant lot at the price set by Ken and Dennis's appraisal. Thus, under their interpretation, even if their appraisal came in at one billion dollars, that is the price Brad would have to pay. To put the shoe on the other foot, under the Croggs' unreasonable interpretation, if the appraisal came in at one dollar, then Brad would be able to purchase the lot at that price. It is unlikely, however, that the Croggs would be willing to live with their interpretation if the shoe were on the other foot. This shows that an implicit term of the agreement is that the appraisal submitted by Ken and Dennis must be reasonable. The trial court found that it was not, and that is why it ordered a third appraisal.

IV. MOTION FOR ATTORNEY'S FEES

Respondent hereby moves for an award of attorney's fees and costs under RAP 18.1. There are two bases for this request. First, the settlement agreement at issue clearly provides that in any "action for a declaration of party's rights or obligations hereunder or any other judicial remedy (including appeals of such suit or action), the prevailing party shall be entitled to be reimbursed by the losing party" for all costs, expenses, and reasonable attorney's fees.[41]

Even if there were not such provision, TEDRA also provides for an award of fees, under RCW 11.96A.150, which provides that "any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party…[f]rom any party to the proceedings."

Under either basis, Brad should be awarded his attorney's fees and costs for having to respond to this meritless appeal. Conversely, the court should deny the Croggs' request for fees.

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[41] CP 6: 1-7

V. CONCLUSION

For the foregoing reasons, the respondent respectfully request that this appeal be denied in full, and that respondent be awarded his attorney's fees and costs incurred on this appeal.

Respectfully Submitted on March 8, 2017

Steven E. Turner

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CERTIFICATE OF SERVICE

I hereby certify that on **March 8, 2017**, I served the foregoing **Respondent's Brief** on:

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s/ Steven E. Turner
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